Public Finance Bhd v Natcom Development Sdn Bhd & Ors

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-296-94
ANNUAR CJ (MALAYA), MOHD AZMI FCJ AND GOPAL SRI RAM JCA
23 APRIL 1996

Civil Procedure *— Want of prosecution — Striking out action for want of prosecution — No action taken by parties to carry out terms of order for directions — Court moved suo motu to deal with matter — Court did not dismiss suit when it came up before it pursuant to show-cause notice — Court granted plaintiff further time — Whether court could later rely on that delay to strike out action — Whether plaintiff guilty of contumelious conduct — Rules of the High Court 1980 O 34 r 8*

Civil Procedure *— Want of prosecution — Striking out action for want of prosecution — No action taken by parties to carry out terms of order for directions — Court moved suo motu to deal with matter — Court granted plaintiff additional time of one month — No peremptory order made requiring plaintiff to act within a month — No undertaking given by plaintiff — Plaintiff filed relevant papers after one month — Court struck out action — Whether court wrong in punishing plaintiff for exceeding the one month deadline — Rules of the High Court 1980 O 34 r 8*

Civil Procedure *— Want of prosecution — Sriking out action for want of prosecution — General principle — Whether court must hearken to spirit and intendment of O 34 r 8 of Rules of the High Court 1980 before striking out — Rules of the High Court 1980 O 34 r 8*

On 24 October 1990, the appellant ('the plaintiff bank') caused to be issued a writ against the respondents ('the defendants'), claiming a sum of money which had been borrowed by the first defendant and guaranteed by the other defendants. The second, fourth and fifth defendants delivered their respective defences. On 24 June 1992, the plaintiff obtained an order for directions which, inter alia, directed the parties to exchange their respective lists of documents within 30 days from its date. The order, however, made no provision for the setting down of the action for trial. Nothing further was done by the parties to carry out the terms of the order, and the suit lay idle in the registry of the High Court for several years. The court then moved *suo motu* to deal with the matter. On 26 January 1994, the High Court issued a notice under O 34 r 8(2) of the Rules of the High Court 1980 ('the RHC') requiring the parties to attend before the judicial commissioner on 13 February 1994. When the suit was called on for disposal on that date, counsel for the plaintiff explained that the matter had been overlooked and asked for a month to take the necessary steps to prosecute the action. The judicial commissioner then adjourned the matter to 19 March 1994. There was no peremptory order made requiring the plaintiff to act within a month. When the suit came up for hearing, it transpired that the plaintiff's solicitors had filed the relevant papers for setting down the action for trial as well as the bundle of documents only on 14 April 1994. The

judicial commissioner stated that he was disappointed that the '[plaintiff's] counsel had failed to comply with the undertaking to set down the matter for trial within a month's time'. He held that the delay on the part of the plaintiff in prosecuting the case was an intentional and contumelious action, and proceeded to dismiss the suit for want of prosecution. He also refused an oral application for further argument in open court made by counsel for the plaintiff pursuant to the rule of court then in existence. The plaintiff appealed.

Held, allowing the appeal:

(1) There had been a long delay on the part of the plaintiff in prosecuting the action, and it was thus open to the judicial commissioner to reject the plaintiff's legal advisers' explanation and to dismiss the suit when it first came up before him pursuant to the show-cause notice on 13 February 1994. However, he chose not to do so, and his decision to grant the plaintiff further time rendered the preceding delay academic. His reliance upon that delay was clearly wrong and amounts to a misdirection on his part (see pp 663F, H and I).

(2) The judicial commissioner approached the case on the footing that counsel for the plaintiff had given an undertaking which she had breached. However, the note recorded by the judicial commissioner disclosed no such undertaking. He might have misunderstood counsel's request for a month's extension to get his client's case in order to amount to an assurance. But an undertaking by counsel quite a different thing, the breach of which may amount to misconduct on the part of the giver of the undertaking (see p 664A–C).

(3) The judicial commissioner appeared to have given little or no weight to the fact that the relevant papers to set the action down for trial had been filed, albeit beyond the one month requested for by counsel. Once the action had been duly entered for trial, it would have been far better for the judicial commissioner to have fixed a date for hearing and disposed of the suit on its merits. The judicial commissioner was, therefore, plainly wrong in punishing the plaintiff for exceeding the month in question. (see p 664D–E).

(4) It followed from what the court had said thus far that the judicial commissioner had proceeded to find the plaintiff guilty of contumelious conduct upon a non-existent basis. His decision, therefore, becomes unsustainable (see p 664F).

(5) Generally, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order made touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim (see p 664G).

(6) Order 34 r 8 provides an effective machinery for the disposal of cases long languishing in our courts. When properly used, it has the beneficial effect of clearing the courts of the unnecessary backlog with which they are burdened. However, when used without due care, it will perpetuate the very delay which it is intended to cure. In this case, had the action not been summarily dismissed, all the trial and appellate procedure available to an unsuccessful litigant might well have been exhausted during this period of delay. As it happened, the action, after a delay of some two years, had now to be remitted to the judicial commissioner for trial (see pp 664H–I and 665A–B).

(7) Judges or judicial commissioners of the High Court must hearken to the spirit and intendment of O 34 r 8, and only strike out those cases falling clearly within the principle as enunciated in this judgment (see p 665C).

[Bahasa Malaysia summary

Pada 24 Oktober 1990, perayu ('plaintif') telah menyebabkan suatu writ dikeluarkan terhadap penentang ('defendan'), untuk menuntut sejumlah wang yang telah dipinjam oleh defendan pertama dan dijamin oleh defendan lain. Defendan kedua, keempat dan kelima telah memberi pembelaan masing-masing. Pada 24 Jun 1992, plaintif telah memperolehi perintah untuk arahan yang mengarah, antara lain, pihak-pihak bertukar-tukar senarai dokumen masing-masing dalam tempoh 30 hari daripada tarikh itu. Namun demikian, perintah tidak membuat sebarang peruntukan untuk penetapan tindakan untuk perbicaraan. Tiada apa langkah lanjut telah diambil oleh pihak-pihak untuk melaksanakan terma perintah itu, dan guaman tersebut telah dibiarkan dalam pejabat pendaftaran Mahkamah Tinggi selama beberapa tahun. Mahkamah kemudian membicarakan perkara itu secara *suo motu*. Pada 26 Januari 1994, Mahkamah Tinggi telah mengeluarkan notis di bawah A 34 k 8(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang menghendaki pihak-pihak hadir di hadapan pesuruhjaya kehakiman pada 13 Februari 1994. Pada tarikh yang ditetapkan untuk penyelesaian guaman tersebut, peguam bagi plaintif menjelaskan bahawa perkara itu telah terlepas perhatian dan meminta tempoh masa selama sebulan supaya langkah yang wajar boleh diambil bagi mendakwa tindakan. Pesuruhjaya kehakiman kemudiannya telah menangguh perkara itu ke 19 Mac 1994. Tiada perintah muktamad telah dibuat yang menghendaki plaintif bertindak dalam tempoh sebulan. Apabila guaman dibicarakan, telah diketahuil bahawa peguamcara plaintif telah memfailkan kertas yang relevan bagi penetapan tindakan untuk perbicaraan bersama dengan ikatan dokumen hanya pada 14 April 1994. Pesuruhjaya kehakiman menyatakan bahawa beliau kecewa sebab 'peguam [plaintif] telah gagal mematuhi akujanji untuk menetap perkara untuk perbicaraan dalam tempoh masa sebulan'. Beliau membuat keputusan bahawa kelewatan pada pihak plaintif dalam mendakwa kes itu merupakan

satu tindakan yang sengaja dan mencemuh, dan terus menolak guaman atas ketiadaan pendakwaan. Beliau juga telah menolak permohonan lisan untuk hujah selanjutnya di mahkamah terbuka yang dibuat oleh peguam bagi plaintif menurut rukun mahkamah yang wujud pada masa itu. Plaintif membuat rayuan.

Diputuskan, membenarkan rayuan:

(1) Terdapat kelewatan yang berlanjutan pada pihak plaintif dalam pendakwaan tindakan itu, dan dengan itu adalah terbuka kepada pesuruhjaya kehakiman untuk menolak penjelasan penasihat guaman plaintif dan untuk menolak guaman apabila ia timbul untuk pertimbangan beliau buat kali pertama menurut notis tunjuk sebab pada 13 Februari 1994. Bagaimanapun, beliau telah memilih untuk tidak berbuat demikian, dan keputusannya untuk memberi plaintif masa selanjutnya menyebabkan kelewatan yang berikutan itu suatu isu akademik. Pergantungan beliau atas kelewatan jelas adalah salah dan merupakan salah arah pada pihaknya (lihat ms 663F, H dan I).

(2) Pesuruhjaya kehakiman telah mengendalikan kes itu atas dasar bahawa peguam plaintif telah memberi satu akujanji yang telah dilanggarnya. Bagaimanapun, nota yang direkodkan oleh pesuruhjaya kehakiman tidak mendedahkan akujanji begitu. Beliau mungkin telah menyalahfaham permintaan peguam untuk pelanjutan selama sebulan supaya kes klien boleh disusun sebagai asurans. Tetapi suatu akujanji oleh peguam adalah perkara berbeza dan pelanggaran boleh merupakan salah laku pada pihak pemberi akujanji (lihat ms 664A–C).

(3) Pesuruhjaya kehakiman nampaknya tidak memberi atau memberi sedikit sahaja pertimbangan kepada fakta bahawa dokumen yang relevan untuk menetapkan tindakan untuk perbicaraan telah difailkan, walaupun ia melampaui tempoh sebulan yang diminta oleh peguam. Sebaik sahaja tindakan dimasukkan untuk perbicaraan, adalah lebih baik jika pesuruhjaya kehakiman menetapkan tarikh untuk pembicaraan dan menyelesaikan guaman itu atas meritnya. Oleh yang demikian, adalah jelas bahawa pesuruhjaya kehakiman telah melakukan kesilapan dalam menghukum plaintif kerana melebihi tempoh satu bulan yang berkenaan (lihat ms 664D–E).

(4) Ekoran daripada apa yang telah dikatakan oleh mahkamah setakat ini, pesuruhjaya kehakiman telah mendapati plaintif bersalah atas kelakuan mencemuh atas dasar yang tidak wujud. Dengan itu, keputusan beliau tidak boleh dikekalkan (lihat ms 664F).

(5) Pada umumnya, tindakan suatu pihak plaintif boleh dibatalkan jika dia gagal mematuhi perintah muktamad yang dibuat yang menyentuh tentang kelakuan dari segi prosedur kesnya atau di mana dia telah menunjukkan dia langsung tidak berminat dalam kelakuan litigasi hinggakan menimbulkan inferens bahawa dia tidak mempunyai apa-apa hasrat dalam membuat pendakwaan atas tuntutannya (lihat ms 664G).

(6) Aturan 34 k 8 KMT memperuntukkan mekanisme yang berkesan bagi penyelesaian kes-kes yang telah lama dibiarkan dalam mahkamah kita. Apabila dipakai secara betul, ia mendatangkan kesan benefisial untuk melapangkan mahkamah daripada lantukan kes yang diperlukan yang membebankannya. Bagaimanapun, apabila dipakai tanpa perhatian yang sewajarnya, ia akan mengekalkan kelewatan yang ia patut betulkan. Dalam kes ini, jika tindakan itu tidak ditolak secara terus pada lebih awal, kesemua prosedur perbicaraan dan rayuan yang sedia ada kepada litigan yang tidak berjaya mungkin telah pun habis digunakan semasa tempoh kelewatan. Secara kebetulan, tindakan itu, selepas kelewatan selama dua tahun, kini terpaksa diremit kepada pesuruhjaya kehakiman untuk dibicarakan (lihat ms 664H–I dan 665A–B).

(7) Hakim atau pesuruhjaya kehakiman Mahkamah Tinggi harus mengingat semangat dan tujuan A 34 k 8, dan hanya membatalkan kes yang jelas dirangkumi oleh prinsip seperti yang dinyatakan dalam penghakiman ini (lihat ms 665C).]

Notes

For cases on want of prosecution, see 2 *Mallal's Digest* (1994 Reissue, paras 3657–3656.

Case referred to

Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152

Legislation referred to

Rules of the High Court 1980 O 25, O 34 r 8, r 8(2)

Appeal from: Civil Suit No 22–179–1990 (High Court, Alor Setar)

Low Kim Leng (*Soo Thien Ming & Nashrah*) for the plaintiff/appellant.
Tony Dhana (*Zaitoon Othman & Associates*) for the defendants/respondents.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This is an appeal against the order of the learned judicial commissioner at Alor Setar, dismissing the appellant's suit for want of prosecution. We heard and allowed this appeal on 22 April 1996. The reasons for our decision now follow. The facts relevant to this appeal may be briefly stated. For convenience, we will refer to the parties as 'plaintiff' and 'defendants'.

On 24 October 1990, the plaintiff bank caused to be issued a writ against the defendants, claiming a sum of RM263,917.96 which had been borrowed by the first defendant and guaranteed by the other defendants. The second, fourth and fifth defendants having delivered their respective defences, the plaintiff on 15 March 1992 took out a summons under O 25

of the Rules of the High Court 1980 and on 24 June 1992, obtained an order for directions. That order, inter alia, directed the parties to exchange their respective lists of documents within 30 days from its date. Surprisingly, however, the order made no provision for the setting down of the action for trial.

Nothing further was done by the plaintiff to carry out the terms of the order. The lists of documents were not exchanged. Nor was the action set down for trial. In short, as is so often the case in civil litigation, the parties treated the order for directions with little or no respect. In consequence, the suit lay idle in the registry of the High Court for several years. The court then moved *suo motu* to deal with the matter.

On 26 January 1994, the High Court issued a notice under O 34 r 8(2) requiring the parties to attend before the judicial commissioner on 13 February 1994. When the suit was called on for disposal on that date, the plaintiff was present by its counsel. The defendants and their counsel were, however, absent. Counsel for the plaintiff explained that the matter had been overlooked and asked for a month to take the necessary steps to prosecute the action. The note recorded by the learned judicial commissioner shows that he then adjourned the matter to 19 March 1994. There was no peremptory order made requiring the plaintiff to act within a month. Neither does the note reflect any undertaking on the part of counsel that the matter would be set down for trial within a month.

For some reason (not readily apparent), the suit was not called on for disposal on 19 March 1994. However, it did come up in chambers on 21 April 1994. On this occasion, counsel for both the plaintiff and the second, fourth and fifth defendants were present. It transpired that the plaintiff's solicitors had filed the relevant papers for setting down the action for trial as well as the bundle of documents only on 14 April 1994. The learned judicial commissioner, after hearing arguments of counsel, proceeded to dismiss the suit. He also refused an oral application for further argument in open court made by counsel for the plaintiff pursuant to the rule of court then in existence.

When he came to write his reasons for his decision, this is what the learned judicial commissioner said:

> The plaintiff did not file any affidavit-in-reply to the show-cause notice. On the day of the hearing of the show-cause (13 February 1994), the learned counsel for the plaintiff, Cik Sofiah bte Ariffin, informed the court that the delay was unintentional: there was some confusion regarding the files maintained by her firm in respect of this suit. Although no affidavit had been filed by the plaintiff in response to the show-cause notice — and the explanation given, to my mind, was lacking in merit — nevertheless, on compassionate grounds, I did not forthwith dismiss the action. Instead, I allowed the plaintiff to proceed subject to an undertaking by the plaintiff's counsel that she would set the action down for trial within a month's time. In order to ensure that the undertaking was complied with, I also ordered that the case be brought up again before me for mention on 19 March 1994. For some reason, however, the mention date was postponed to 21 April 1994.

A However, on 21 April 1994, I was disappointed to note that learned counsel had not complied with the undertaking to set down the matter for trial within a month's time. The notice to set down the action for trial, the bundle of documents and the bundle of pleadings were filed by the plaintiff only on 14 April 1994. In other words, there was a delay of about a month. Again, no affidavit was filed to explain the delay. Learned counsel for the B plaintiff, speaking from the bar, put the blame for the delay on the defendants' solicitor. She said that the defendants' solicitor did not respond to the plaintiff's solicitor's letter regarding the documents to be agreed upon. To my mind, there was no proper and sufficient explanation given by the plaintiff's counsel for the failure to comply with the undertaking. Indeed, with respect, I must remark here that I had been generous earlier on in C allowing the plaintiff to proceed, but unfortunately my generosity had been abused.

The learned judicial commissioner then referred to the decision in *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152 and having reproduced the relevant passages from the judgment of Salleh Abas FJ D (later Lord President) in that case, concluded as follows:

> On the facts of the present case, it was clear that there had been a very long delay. Taking the time from the date of the order pursuant to the summons for directions until the date of the notice to show cause issued by the court, there had been a lapse of about one year and eight months. However, taking the time from the date of the filing of the writ until the date of the notice to E show cause, there had been a lapse of slightly more than three years! In my view, judging from the conduct of the plaintiff, the delay was an intentional and contumelious action disrespectful to the court.

With respect to the learned judicial commissioner, we found ourselves in disagreement with the views he had expressed.

F First, there is absolutely no question of there having been a long delay on the part of the plaintiff in prosecuting the action. Those who invoke the process of the court must be prepared to act timeously in having their grievances heard. The courts are no longer prepared to tolerate the long delays with which the law has been associated. These days, trial G courts are anxious to clear the business assigned to them. All others who are concerned in the administration of civil justice should ensure that the courts are not unnecessarily burdened with litigation which it is not intended to be prosecuted in earnest.

That said, in the present case, it was perfectly open to the learned H judicial commissioner to have rejected the explanation proffered by the legal advisers of the plaintiff and to have dismissed the suit when it first came up before him, pursuant to the show-cause notice, on 13 February 1994. But he chose not to do so. Instead, he gave the plaintiff further time to enter the action for trial. That he did so on compassionate grounds is I wholly irrelevant. The fact remains that his decision to grant the plaintiff further time rendered the preceding delay academic. His reference to, and reliance upon, that delay was clearly wrong and amounts to a misdirection on his part.

Second, the learned judicial commissioner approached the case on the footing that counsel for the plaintiff had given an undertaking which she had breached. As we have earlier observed, the note recorded by the learned judicial commissioner discloses no such undertaking as suggested by him in his judgment. In fairness to him, he may well have misunderstood counsel's request for a month's extension to get his client's case in order to amount to an assurance. But an undertaking by counsel is quite a different thing altogether. It is a serious matter, the breach of which may amount to misconduct on the part of the giver of the undertaking.

Having had the relevant note read and re-read to us, we are entirely satisfied that there was nothing to even remotely suggest that counsel had given his solemn undertaking in the terms referred to by the judicial commissioner in his judgment. Further, the order he made on 13 February 1994 merely adjourned the case to 19 March without any further minute referring to an undertaking.

Third, the learned judicial commissioner appears to have given little or no weight to the fact that the relevant papers to set the action down for trial had been filed, albeit beyond the one month requested for by counsel. That there was no undertaking given puts paid to the learned judicial commissioner's view that the month was exceeded. Once the action had been duly entered for trial, it would have been far better for the judicial commissioner to have fixed a date for hearing and disposed of the suit on its merits. The fact that the month requested for had been exceeded takes one nowhere. The learned judicial commissioner was, therefore, plainly wrong in punishing the plaintiff for exceeding the month in question.

It follows from what we have said thus far that the judicial commissioner had proceeded to find the plaintiff guilty of contumelious conduct upon a non-existent basis. His decision, therefore, becomes unsustainable.

The law in regard to the timeous prosecution of suits has been stated in many cases decided by the precursors of this court and nothing may be usefully added to the learning contained in them. The effect of those decisions may be summarized thus. Generally speaking, a plaintiff is liable to have his action struck out if he has failed to obey a peremptory order made touching upon the procedural conduct of his case or where he has displayed such a general disinterestedness in the conduct of the litigation as to invite the inference that he has no desire in prosecuting his claim.

Order 34 r 8 is a wholesome provision which provides an effective machinery for the disposal of cases long languishing in our courts. When properly used, it has the beneficial effect of clearing the courts of the unnecessary backlog with which they are burdened. When used without due care and caution, it will perpetuate the very delay which it is intended to cure.

Take this very case. Had the learned judicial commissioner decided to try the action rather than summarily dismissing it as he did, the case would have been finally disposed of in a few months. Any appeal to the Court of Appeal would likewise have been heard and determined not long

thereafter. A further appeal, if any, to this court would also have been dealt with.

As it happens, the action, after a delay of some two years, has now to be remitted to the learned judicial commissioner for trial. Had the action not been summarily dismissed, all the trial and appellate procedures — of which we spoke a moment ago — available to an unsuccessful litigant may well have been exhausted during this period of delay.

Judges or judicial commissioners of the High Court must hearken to the spirit and intendment of O 34 r 8, and only strike out those cases falling clearly within the principle we have enunciated earlier in this judgment. An overzealous application for the rule may prove counter-productive.

Having satisfied ourselves that the learned judicial commissioner had misdirected himself, we had no alternative but to allow the appeal. The order of the learned judicial commissioner was set aside and the suit was restored to file. The defendants were ordered to pay the costs of the appeal to the plaintiff. The security deposit lodged by the plaintiff in court was ordered to be refunded to it.

Order accordingly.

Reported by Isabel Liong